IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

BRIEF OF STATE OF LOUISIANA IN OPPOSITION TO MOTION OF NEW JERSEY FOR LEAVE TO INTERVENE AND TO FILE COMPLAINT

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The State of Louisiana opposes the motion of the State of New Jersey for leave to intervene and to file complaint.

The complaint that New Jersey seeks to file is virtually identical to the complaint that has been filed in these proceedings by the eight plaintiff States — the States of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin. The proposed complaint is therefore subject to the same jurisdictional, standing, and prudential

problems that adhere to the complaint that this Court has allowed the eight States to file.

There is now pending before the Court a motion by the State of Louisiana to dismiss the complaint of these eight States for various jurisdictional and standing reasons. That motion also incorporates a prudential reason for dismissing the complaint, i.e., the pendency in the Louisiana courts of a tax refund suit that puts into issue the identical federal constitutional questions concerning the Louisiana First Use Tax statute that the plaintiff States seek to adjudicate before this Court. All of these jurisdictional, standing, and prudential considerations apply with equal force to the complaint New Jersey proposes to file. Accordingly, Louisiana opposes New Jersey's motion for leave to intervene and to file another defective complaint.

1. *None of these threshold problems have been resolved by the Court order allowing the eight States to file a complaint.*

On June 18, 1979, the Court entered a summary order granting leave to the eight States to file their joint bill of complaint. Leave was granted without reference to the various objections raised in Louisiana's opposition to the motion for leave to file.

In no event can the June 18 order, which was unaccompanied by any explanatory opinion, be deemed an acknowledgement by this Court that it has jurisdiction over the complaint filed by the eight States. Nor can the order be deemed an adjudication that there are no standing or other prudential factors that would make it inappropriate to exercise original jurisdiction in this instance. All these matters remain open to challenge by the State of Louisiana in its pending motion to dismiss that complaint. And all these matters remain open for use in assessing whether New Jersey should be granted leave to file its

proposed complaint. Denial of leave is dictated by the following considerations:

(1) Original proceedings before this Court frequently follow no set procedural pattern. On occasion the Court may use the motion for leave to file a complaint as the occasion for adjudicating, through a written opinion, various jurisdictional, standing, or prudential problems that have been raised. See, e.g., *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). Alternatively, the Court may grant a state leave to file a complaint "as of course," despite jurisdictional and other objections, leaving such objections to be renewed and adjudicated in a subsequent motion to dismiss the filed complaint. See, e.g., *Kansas v. United States*, 204 U.S. 331, 337 (1907); *United States v. West Virginia*, 295 U.S. 463, 467 (1935). Obviously, the latter alternative has been followed in these proceedings.

(2) Allowing a complaint to be filed by a state, without more, does not create a jurisdictional precedent. In cases on the appellate docket, where review has been had in this Court on the merits without mention of any jurisdictional problems, the Court has consistently noted that such action "is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the [jurisdictional] issue was ignored." *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, n.2 (1947), and cases cited.

So too in this case, the mere fact that the complaint of the eight States has been ordered filed by this Court is no reason for considering the filing order as an authoritative precedent, or as *res judicata*, on any jurisdictional, standing, or prudential proposition that was raised or that might have been raised. Only an express ruling on such matters could put them to rest.

(3) Supplementing these considerations is the historic doctrine that jurisdictional issues can be raised — and even renewed — at any time and at any stage in a proceeding. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 536-537 (1962). There is no reason or policy that dictates that a court, having accepted a case for review or entertained the filing of a complaint, must continue to exercise jurisdiction over the case once it becomes evident that jurisdiction is lacking or that continued exercise of jurisdiction would be imprudent. Particularly is that true where, as here, new developments have occurred that augment the impropriety of continuing the case on the docket.

In short, this Court has unquestioned power to consider the jurisdictional, standing, and prudential objections to the filing of another complaint by the State of New Jersey. Nothing in the Court's order of June 18, 1979, forecloses that consideration or mandates the filing of the proposed complaint.

2. *Jurisdictional, standing, and prudential considerations warrant denial of leave to file the proposed complaint.*

Since the various threshold objections contained in Louisiana's motion to dismiss the complaint of the eight States are fully applicable to the effort of New Jersey to file an identical kind of complaint, the objections can be quickly recapitulated.

A. *Availability of an alternative forum*

The decision in *Arizona v. New Mexico*, 425 U.S. 794 (1976), which culminates a line of decisions starting with *Massachusetts v. Missouri*, 308 U.S. 1 (1939), enunciates the policy of this Court not to exercise its original jurisdiction where there is another forum with jurisdiction over the parties in interest, where the issues tendered in this Court may be litigated, and where appropriate relief may be had.

The instant situation is on all fours with that involved in *Arizona v. New Mexico*. Here the seventeen private pipeline companies involved in this suit, like the three utilities involved in the *Arizona* case, have filed an appropriate action in the Louisiana state courts that raises all the federal constitutional objections that New Jersey here asserts with respect to the Louisiana First Use Tax statute. Here, as in the *Arizona* case, that action "provides an appropriate forum in which the *issues* tendered here may be litigated . . . [and in which, should the Louisiana courts hold the statute unconstitutional, New Jersey] will have been vindicated." 425 U.S. at 797. The appropriateness of the Louisiana tax refund procedure invoked by the seventeen pipeline companies, in terms of justifying the non-exercise of original jurisdiction, has been fully recognized by this Court in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-297 (1943).

It would be specious to suggest, as the eight States have done, that this Court first obtained jurisdiction over the subject matter of New Jersey's complaint by its June 18 order permitting the filing of the complaint of the eight States, and that this Court must therefore hold and maintain jurisdiction to the exclusion of the Louisiana state courts. Cf. *Ex parte Young*, 209 U.S. 123, 161-162 (1908). As noted in Part I of this opposition, the June 18 order did not constitute an assumption by this Court of jurisdiction over this original proceeding. And in no event can the freedom of this Court not to exercise original jurisdiction in a given case be circumscribed by a time lag in invoking the jurisdiction of another suitable forum. This Court's original jurisdiction is not an "alternative to the redress of grievances which could have been [timely] sought" in other forums. *Illinois v. Michigan*, 409 U.S. 36, 37 (1972). Nor is the exercise of this Court's original jurisdiction the prize for

winning any race to the courthouses.[1]

The appropriateness of the pending tax refund suit in the Louisiana courts is further highlighted by the fact that it affords an opportunity for the real parties in interest to confront each other. As was true of the private utilities in the *Arizona* case, 425 U.S. at 798, the legal incidence of the use tax in question is upon the seventeen pipeline companies, not upon New Jersey or the other States. The pipeline companies, as the real taxpayers in interest, cannot qualify as parties before this Court under its original jurisdiction, nor can they secure from this Court any tax refund relief. But such standing and such relief are available in the Louisiana state courts, from which appellate review by this Court would of course be available. New Jersey, like the eight plaintiff States, is free to intervene or otherwise participate in these Louisiana state court proceedings to assert and protect whatever interest it may have, if any.[2]

B. *The absence of jurisdiction*

The complaint that New Jersey proposes to file does not

1. Any such argument that this Court must assume jurisdiction since its jurisdiction was the first to be invoked overlooks the fact that the jurisdiction of two other lower courts were invoked, as to the identical constitutional issues here involved, *prior* to this Court's order of June 18, 1979, and indeed prior to the filing on March 29, 1979, of the motion of the eight States for leave to file their complaint. Those two cases are:
   (1) On September 22, 1978, the State of Louisiana instituted a declaratory judgment action in the Nineteenth Judicial District Court in and for East Baton Rouge Parish, Louisiana, No. 216,867, *Edwards, et al. v. Transcontinental Gas Pipeline Corp., et al.* 464 F.Supp. 654 (1979).
   (2) On September 29, 1978, the Federal Government instituted an action in the United States District Court for the Middle District of Louisiana, No. 78-384, *Federal Energy Regulatory Commission v. McNamara, et al.* See appendix to Louisiana's brief in support of motion to dismiss.
2. On June 22, 1979, four days after the entry of this Court's order of June 18, the same seventeen private pipeline companies that seek to intervene as plaintiffs in the instant original proceeding filed the tax refund suit in the Nineteenth Judicial District Court in and for East Baton Rouge Parish, Louisiana, Docket No. 225,533, *Southern Natural Gas Co., et al. v. McNamara.* Pertinent portions of the complaint in that tax refund suit are reproduced in the appendix to the brief of the State of Louisiana in opposition to the brief of the United States and the Federal Energy Regulatory Commission as amici curiae.

allege any cause of action within the purview of this Court's original jurisdiction under Article III, Section 2, clauses 1 and 2, and 28 U.S.C. §1251(a)(1). Those constitutional and statutory provisions confer jurisdiction on this Court to hear and determine cases and controversies "between two or more States." The jurisdictional defect here is that New Jersey has alleged no "controversy" with the State of Louisiana.

New Jersey asserts in its proposed complaint (paragraph X) that the Louisiana First Use Tax that it seeks to challenge "will be required to be paid by interstate natural gas pipeline companies." There is no assertion that Louisiana has sought to impose this tax upon New Jersey or any other state. There is no assertion that Louisiana decreed that its tax be passed on from the pipeline companies to the State of New Jersey or its citizens. In other words, there is no assertion of any kind of interest or concern on New Jersey's part other than that the First Use Tax, presumably as the result of the authorization from the Federal Energy Regulatory Commission permitting the pipeline companies to pass along to consumers the cost of the tax, has an "impact" upon the price paid by the gas consumers in New Jersey, "with resulting economic burdens and hardship" (paragraph XV).

New Jersey in effect has conceded that it has no more than the indirect interest that every consumer has in the imposition of a tax that is ultimately reflected in the higher price paid by the consumer for a particular commodity. The very indirectness of this interest belies its character as an Article III controversy. Unless a plaintiff State can allege that it has a "direct interest in the particular property or rights immediately affected or to be affected," *Oklahoma v. Atchison, T.&S.F.R. Co.*, 220 U.S. 277, 286 (1911), no controversy with a defendant State has been asserted.

Moreover, New Jersey has not alleged that the economic injury for which it seeks redress "was directly caused by the

action of another State," *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976). The line of causation between the imposition of the use tax and the higher prices paid by the ultimate gas consumers was irretrievably broken by the voluntary actions of the pipeline companies in seeking and gaining federal authorization to pass the cost of the tax on to the consumers. The resulting indirectness of the injury to the consumers drains the proposed complaint of the requisite "direct causation" that marks an Article III controversy.

The absence of any true "controversy" between New Jersey and Louisiana further reflects the fact that there is no generally recognized cause of action by an ultimate consumer seeking to protest the imposition of some tax or burden on the manufacturer that is passed on to the consumer in the form of higher retail prices. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court refused to read into the federal antitrust laws any such "pass-on theory" as a basis for a cause of action. There appears to be even less justification for reading the "pass-on theory" of a cause of action into the Article III concept of a case or controversy for original jurisdictional purposes.

C. *The absence of standing*

The inability of New Jersey to allege its own "controversy" with Louisiana leads to the final defect in the proposed complaint, the lack of New Jersey's standing to protest the imposition of a Louisiana use tax on gas owners.

It is now common ground in this tax litigation that the real parties in interest are the pipeline taxpayers and the tax-levying State of Louisiana. Neither the State of New Jersey nor its gas-consuming citizens are the direct targets in the imposition of Louisiana's First Use Tax. The interests of New Jersey both as a gas-consuming state entity and as *parens patriae* for its gas-consuming citizens, stem not from the imposition of the

use tax but from the economic burdens resulting from the "pass-on" by the taxpaying pipeline companies of the cost of the tax.

As is true with respect to the eight States that have filed a complaint, New Jersey is seeking to place itself in the untenable position of standing in as a "volunteer" for the pipeline companies and protesting the tax laid upon those pipeline companies. What New Jersey and the other States are seeking to do is to act as surrogates for private taxpayers in their protests against state tax levies, and to utilize this Court's original jurisdiction to accommodate and protect the real and direct interests of the private taxpayers. New Jersey simply has no standing before this Court to make such private taxpayer claims. And this Court has consistently refused to permit a complaining State to proceed with an original suit once it appears that it is actually suing on behalf of private interests or individual taxpayers rather than on behalf of the direct interests of the State, either as sovereign or *parens patriae*. See *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-393 (1938); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Arkansas v. Texas*, 346 U.S. 368 (1953); *Illinois v. Michigan*, 409 U.S. 36 (1972); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664-666 (1976).

Indeed, the efforts of the private pipeline taxpayers to assert their direct interests on all judicial fronts serve to demonstrate conclusively the indirect nature of the interests of New Jersey and the other States. The taxpayers have instituted a tax refund suit in the Louisiana state court, which is the proper and adequate forum for airing and resolving the real interests at stake. More than that, however, the private taxpayers have sought to intervene in these original proceedings not simply to air their tax concerns but to file their own complaint.

The State of Louisiana has protested this effort by private taxpayers to use the original jurisdiction of this Court as a vehicle for securing redress of their private tax complaints. This Court has never exercised original jurisdiction under Article III to consider such private claims. *United States v. Texas*, 143 U.S. 621, 643-644 (1892). But apart from that jurisdictional void, the obvious ability of the private taxpayers to assert their tax claims in constitutional terms in the proper state court forum renders it completely unnecessary for New Jersey to act as a volunteer surrogate in this Court for the assertion of those private claims. New Jersey, in short, simply has no cognizable standing in this Court to assert a private taxpayer's constitutional objections to a use tax.[3]

All these considerations lead back inevitably to the proposition that the availability of the Louisiana tax refund procedure makes it unnecessary for this Court to continue further with this original action. Indeed, by allowing the real parties in interest to resolve their problems in the tax refund suit, this Court need not address the serious jurisdictional and standing issues that New Jersey's proposed complaint presents. New Jersey's motion for leave to file another complaint can be denied simply by reference to the prudential principles set forth in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

CONCLUSION

For any and all of the foregoing reasons, the motion of the State of New Jersey for leave to intervene and to file complaint should be denied.

3. New Jersey's fourth cause of action in its proposed complaint (par. XLVI) is a particularly flagrant instance of New Jersey's lack of standing to assert the constitutional rights of third parties not before this Court. It is there alleged that a provision of the Louisiana First Use Tax statute impairs the obligation of contracts entered into by the producers of natural gas and the owners of the gas at the time of a taxable first use. New Jersey, of course, is not a party to such contracts.

All the above and foregoing is thus respectfully submitted.

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I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 3rd day of December, 1979, I served copies of the foregoing Brief of State of Louisiana in Opposition to Motion of State of New Jersey for Leave to Intervene and to File Complaint by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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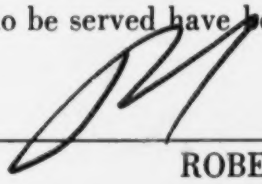

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